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No. 71-1185

In the Supreme Court of the United States

OCTOBER TERM, 1971

O. H. DESHOTELS, JR., and FAY C. DESHOTELS,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,

SCOTT P. CRAMPTON,
Assistant Attorney General,

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OPINIONS BELOW

The findings of fact and conclusions of law of the district court are not reported. The order of the court of appeals denying the motion to dismiss the government's appeal (Pet. 2) is not reported. The opinion of the court of appeals is reported at 450 F. 2d 961.

JURISDICTION

The order of the court of appeals denying the motion to dismiss the government's appeal was entered on October 21, 1971 (Pet. 2). The judgment of the

court of appeals, relating both to the motion to dismiss and to the merits of the case, was entered on November 3, 1971, and amended on February 4, 1972 (Pet. App. 9a-11a). By order dated December 22, 1971, Mr. Justice Stewart extended the time for filing a petition for a writ of certiorari to and including April 1, 1972. The petition was filed on March 14, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court had power to amend an erroneous judgment, where it acted, at the suggestion of government counsel, within ten days of the entry of judgment.

RULES INVOLVED

Rule 4 of the Federal Rules of Appellate Procedure and Rule 59(e) of the Federal Rules of Civil Procedure are set forth in the Appendix, *infra*, pp. 9-10. Rule 60 of the Federal Rules of Civil Procedure is set forth in the petition (pp. 4-5).

STATEMENT

On July 21, 1970, the trial judge signed a judgment (Pet. App. 1a-2a) awarding an income tax refund to petitioner [1] for 1962 of $43,085.57, "together with interest thereon at the rate of six percent (6%)

[1] References to "petitioner" are to O. H. Deshotels. Fay C. Deshotels is a party only because she filed a joint income tax return with her husband.

per annum, from November 15, 1965, until paid." Government counsel had signified that, in the light of the court's opinion, it had no objection to the form or content of the judgment (Pet. App. 5a-6a). The judgment was entered on July 22, 1970.

On the following day, July 23, 1970, government counsel wrote a letter (Pet. 7a-8a) to the trial judge, submitting a "corrected judgment for entry" and stating:

> The purpose of the corrected judgment is to eliminate that provision of the judgment previously entered which decreed that interest on the judgment should run until the date of payment. The corrected judgment has been drawn to comply with the requirements of 28 U.S.C., Section 2411(a).[2]

The corrected judgment (Pet. App. 2a-3a), signed by the trial judge on July 24, 1970, and entered on July 27, 1970, specified that petitioner should receive interest on the fund "as provided by law," and that "this judgment supersedes and replaces" the judgment entered on July 22, which "is hereby vacated and set aside."

On September 23, 1970, the government filed a notice of appeal from the judgment entered in the district court on July 27, 1970. Petitioner moved to

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[2] The cited statute provides that, in any judgment for refund of an overpayment of taxes, interest shall be allowed "to a date preceding the date of the refund check by not more than thirty days, such date to be determined by the Commissioner of Internal Revenue."

dismiss the government's appeal on the ground that the corrected judgment entered on July 27, 1970, was a nullity; that the original judgment of July 22 remained the final judgment; and, therefore, that the government's notice of appeal of September 23 was not filed within the 60-day period prescribed by 28 U.S.C. 2107. The court of appeals summarily denied petitioner's motion (Pet. 2), and it is this denial that is the subject of the petition for certiorari. Petitioner does not seek further review of the merits of the case, on which the Fifth Circuit in part reversed the judgment of the district court.

ARGUMENT

The decision below is correct. There is no conflict or any other basis for further review.

1. Rule 59(e) of the Federal Rules of Civil Procedure, Appendix, *infra*, p. 10, provides that: "A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment." Rule 4(a) of the Federal Rules of Appellate Procedure, Appendix, *infra*, pp. 9-10, suspends the running of the time for filing a notice of appeal, when a timely motion is filed under Rule 59(e), until an order is entered granting or denying the motion. The correction of a provision in a judgment for interest is an alteration or amendment of the judgment within the meaning of Rule 59(e). *Spurgeon* v. *Delta Steamship Lines, Inc.*, 387 F. 2d 358 (C.A. 2); *Gray* v. *Dukedom Bank*, 216 F. 2d 108 (C.A. 6).

While Rule 59(e) does not expressly authorize a district court to alter or amend a judgment on its own motion, there are cogent reasons for ascribing to the court the power to do so, provided that action is taken within ten days of the entry of judgment. As stated in 6A Moore's *Federal Practice* (1971 ed.) § 59.12[4]:

> Rule 60(a) [F.R.Civ.P.] authorizes the court to correct clerical mistakes in judgments and errors therein arising from oversight or omission at any time on its own initiative. And Rule 59(d) authorizes the court to grant a new trial on its own initiative, provided it does so not later than 10 days after entry of the judgment. * * * The authorizations in Rules 60(a) and 59(d) for the court to act on its own motion are only declaratory examples of the general power of a court to act on its own initiative. And we conclude that the court has the power on its own motion to alter or amend a judgment, but if the alteration or amendment is of a substantial character, so that it does not fall fairly within the purview of Rule 60(a), that the court's action to be valid under Rule 59 must be taken by it not later than 10 days after the entry of judgment.

In a footnote to the foregoing passage, it is further noted that:

> Clearly it [the district court] has the power within the 10 day period, to grant a new trial on its own initiative under [Rule] 59(d) * * * and may do so for error of law. * * * The trial court could then grant a new trial because of legal error in the judgment and immediately

> thereafter grant a summary judgment, basing its action upon the prior record, and frame the new judgment exactly as it would have amended or altered the former judgment. The Rules [of Civil Procedure] should not be interpreted to require such circuitry.

In the case at bar, the district court acted, at the suggestion of government counsel, to correct the provision for interest in the original judgment of July 22, 1970. The action was taken well within ten days of the entry of the original judgment. The correction eliminated a provision for the payment of interest which was directly in violation of the governing statute. As petitioner himself concedes (Pet. 3), the correction was made to "conform to existing law • • •." Given these circumstances, the court of appeals properly held that the district court's entry of the corrected judgment was a valid exercise of its power to alter or correct judgments, as contemplated by Rule 59(e).

It has similarly been held that Rule 60(b), F.R. Civ.P., which authorizes a district court on motion to relieve a party from a final judgment on such grounds as mistake, newly discovered evidence and fraud, does not deprive the court of the power to act in the interests of justice where no motion has been made. *United States* v. *Jacobs*, 298 F. 2d 469 (C.A. 4). And in a case where a tardy motion under Rule 60(b) was made, but no detrimental reliance on the original judgment was shown, the Fifth Circuit has held that under "the compelling policies of

basic fairness and equity reflected by [Rule] 60(b), the Court had a duty to conform its judgment to the law as enacted by Congress." *Meadows* v. *Cohen*, 409 F. 2d 750, 753.

Generally, this Court too has sustained the power of federal courts to supersede judgments with new ones, citing 28 U.S.C. 452 and *Zimmern* v. *United States*, 298 U.S. 167. It also has recognized that, if a substantive change is involved, the time for appeal is tolled until the new judgment is entered. See *Federal Trade Commission* v. *Minneapolis-Honeywell Co.*, 344 U.S. 206.

2. Petitioner erroneously asserts conflict (Pet. 9-10) between the decision below and that of the Eighth Circuit in *Hoffman* v. *Celebrezze*, 405 F. 2d 833. There the court held that relief under Rule 60(b) could not be granted, principally on the ground that the motion for such relief had been filed after the time for appeal had expired. The court also stressed that a consent decree was involved. In the instant case, on the other hand, the district court acted within a matter of days after the original judgment was entered, and the only form of consent involved was the government's consent to the entry of the original judgment.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Solicitor General.

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GRANT W. WIPRUD,
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APRIL 1972.

APPENDIX

Federal Rules of Appellate Procedure:

Rule 4. APPEAL AS OF RIGHT—WHEN TAKEN

(a) *Appeals in Civil Cases.* In a civil case (including a civil action which involves an admiralty or maritime claim and a proceeding in bankruptcy or a controversy arising therein) in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days of the date of the entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days of such entry. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days of the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this subdivision, whichever period last expires.

The running of the time for filing a notice of appeal is terminated as to all parties by a timely motion filed in the district court by any party pursuant to the Federal Rules of Civil Procedure hereafter enumerated in this sentence, and the full time for appeal fixed by this subdivision commences to run and is to be computed from the entry of any of the following orders made upon a timely motion under such rules: (1) granting or denying a motion for judgment under Rule 50 (b); (2) granting or denying a motion under Rule 52(b) to amend or make additional findings

of fact, whether or not an alteration of the judgment would be required if the motion is granted; (3) granting or denying a motion under Rule 59 to alter or amend the judgment; (4) denying a motion for a new trial under Rule 59. A judgment or order is entered within the meaning of this subdivision when it is entered in the civil docket.

Upon a showing of excusable neglect, the district court may extend the time for filing the notice of appeal by any party for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision. Such an extension may be granted before or after the time otherwise prescribed by this subdivision has expired; but if a request for an extension is made after such time has expired, it shall be made by motion with such notice as the court shall deem appropriate.

Federal Rules of Civil Procedure:

Rule 59. NEW TRIALS: AMENDMENTS OF JUDGMENTS

* * * *

(e) *Motion to Alter or Amend a Judgment.* A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

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